

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

BRUCE BURTON et al.,)
)
 Employee/Grievants,)
)
 v.)
)
DEPARTMENT OF CORRECTION,)
)
 Employer/Respondent.)

CONSOLIDATED DOCKET
No. 12-03-540

DECISION AND ORDER

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on September 26, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, Victoria D. Cairns, and Paul R. Houck, Members, a quorum of the Board under *29 Del. C. §5908(a)*.

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray Sheppard
Board Administrator

Lance Geren, Esquire
on behalf of the Employee/Grievants

Laura L. Gerard
Deputy Attorney General
on behalf of the Department
of Correction

BRIEF SUMMARY OF THE EVIDENCE

The Department of Correction (DOC) offered and the Board admitted into evidence without objection fourteen documents pre-marked for identification as Exhibits A-N. During the hearing, the Board asked the DOC to provide a copy of Policy Number 8.27 (Department Uniforms/Dress Code) which the Board admitted into evidence marked for identification as Exhibit O.

DOC called two witnesses: Janet Durkee, Director of Human Resources; and Warden Perry Phelps.

The employee/grievants¹ offered and the Board admitted into evidence eleven documents pre-marked for identification as Exhibits 1-11.

The employee/grievants called one witness: Captain Karl Hazzard.

FINDINGS OF FACT

The class specification for the position of Correctional Security Superintendent lists as the first of five job requirements: “At least three years’ experience as a Correctional Lieutenant OR at least two years’ experience as a Correctional Staff Lieutenant OR at least one year experience as a Correctional Captain.” The class specification does not provide for equivalent experience for those positions. ²

¹ The Board consolidated the appeals of the eight grievants: Bruce Burton; Randall Dotson; Guy Fowler; Mark Rispoli; Roland Willey; John Enders; Thomas Secord; and Michael Little.

On September 17, 2012, DOC filed a motion to dismiss Michael Little’s grievance for lack of standing because he did not apply for the promotion at issue. On September 25, 2012, the employee/grievants opposed the motion. Because of a common nucleus of fact, the Board joined the jurisdictional issue to the merits.

² In contrast, one of the job requirements in the class specifications for the position of

On June 30, 2011, the Office of Management and Budget (OMB) posted an opening for the position of Correctional Security Superintendent (CSS) at the James T. Vaughn Correctional Center (JTVCC). The closing date for the posting was July 9, 2011.

Paragraph 1 of the “JOB REQUIREMENTS” section of the posting provided: “1. At least three years’ experience as a Correctional Lieutenant OR at least two years’ experience as a Correctional Staff Lieutenant OR at least one year experience as a Correctional Captain.” The posting did not provide for equivalent experience for those positions.

Warden Perry Phelps chaired the Selection Committee which included Deputy Warden David Pierce, Deputy Warden Linda Valentino, and Deputy Warden Christopher Klein. The Committee received a list of eighteen qualified candidates from Human Resources. The Committee interviewed each of the candidates and then ranked them. According to Warden Phelps, John H. Brennan (Brennan) was the top choice of three of the four members of the Committee.

On September 6, 2011, the DOC issued an announcement, “Brennan Named Security Superintendent at James T. Vaughn Correctional Center.”

Prior to his promotion, Brennan held the position of Trainer/Educator III. He was responsible for training recruit correctional officers at the DOC Training Academy (a nine-week program) and refresher training for Correctional Officers. Brennan is a sworn Correctional Officer. After reaching the rank of Corporal on the operations side of DOC, he has since had largely administrative duties for compliance and professional standards.

Brennan holds the titular rank of Captain, even though he is not a Watch Commander,

Correctional Lieutenant is “At least eighteen months experience as a Correctional Lieutenant or equivalent experience.”

Shift Commander, or Unit Commander. DOC Policy Number 8.27 provides that, as a Trainer/Educator III, Brennan's uniform/dress code rank/insignia was "Captain: Double gold bar." According to the OMB Selective Market Variation Pay Table (2012), both the class titles of "Captain" and "Trainer/Educator III" are grouped in the same paygrade (C15).

According to Janet Durkee, it has been the DOC's practice for the last five years to view class specifications as "descriptive and not restrictive" allowing for "equivalency" when it comes to work experience.³ The DOC has qualified six "equivalents" for the CSS position and promoted one of them. In 2009, the DOC promoted Linda Valentino, then an Educator/Trainer III, to the position of CSS at SCI as an equivalent to the position of Correctional Captain.

According to Durkee, it is well known throughout the DOC that equivalent work experience may qualify a candidate for promotion which is why the union did not grieve Linda Valentino's promotion. According to Captain Karl Hazzard, however, equivalency was a union issue and the union believed that management had revised the job posting language to eliminate any reference to equivalency.

The Board finds as a matter of fact that at the time Brennan applied for the CSS position at JTVCC he held the titular rank of Captain, but that his job position or classification was Educator/Trainer III.

The Board finds as a matter of fact that a job requirement as set forth in both the class specification and job posting was at least three years' experience as a Correctional Lieutenant, or at least two years' experience as a Correctional Staff Lieutenant, or at least one year experience

³ The Board notes that the term "descriptive and not restrictive" used by Durkee comes from the "Essential Functions" section of the class specifications which provides that "incumbents can complete job duties of similar kind not specifically listed here." Essential functions are not qualifiers like education and experience to go to the next step of the selection process.

as a Correctional Captain.

The Board finds as a matter of fact that the job posting referred to the classified positions of Correctional Lieutenant, Correctional Staff Lieutenant, and Correctional Captain, and did not refer to titular ranks.

The Board finds as a matter of fact that, although Brennan held the rank of Captain, he did not have the required years of experience in the position of Correctional Lieutenant, Correctional Staff Lieutenant, or Correctional Captain.

CONCLUSIONS OF LAW

Merit Rule 6.2 provides:

Job Posting. When posting a vacant position, the appointing authority shall post at least seven (7) calendar days before the closing date for receipt of applications. Job postings shall contain all pertinent information about the positions being filled. . . .

Merit Rule 10.4 provides:

Promotion. Candidates selected for promotion shall meet the position's job requirements. . . .

Merit Rule 18.5 provides:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

The employee/grievants claim that the DOC violated subsection (1) of Merit rule 18.5

because Brennan did not meet the job requirements for the CSS position at JTVCC. They also claim that the DOC violated subsection (2) of Merit Rule 18.5 because the job posting did not contain all of the pertinent information about the position being filled. They also claim that the DOC violated subsection (3) of Merit Rule 18.5 because the selection of Brennan for CSS was a gross abuse of discretion.

The Board concludes as a matter of law that Brennan did not meet the requirements for the position of CSS at JTVCC as posted. The Board therefore does not need to address the employee/grievants' claims under Merit Rule 18.5(2) or Merit Rule 18.5(3).

DOC argued that it has been the agency's historical practice to qualify candidates for promotion based on equivalent work experience. But the agency's practice cannot override the Merit Rules. Merit rule 6.2 requires that "Job postings shall contain all pertinent information about the positions being filled." The job posting for the CSS position at JTVCC did not contain the pertinent information about equivalency. Merit Rule 10.4 requires that "Candidates selected for promotion shall meet the position's job requirements." Brennan did not meet the job requirements for CSS because he did not have the required year of work experience in the position of Correctional Captain, whether or not Brennan had equivalent experience in his position as Trainer/Educator III.

DOC also argued that, because Brennan holds the rank of Captain, he met the job requirements for the position of CSS. This argument fails because there is a clear distinction between your "rank" within the DOC, and your "position." Brennan may have held the rank of Captain, but his position was Educator/Trainer III, not Correctional Captain, even though the two positions fall within the same pay grade (C15) and wear the same rank insignia.

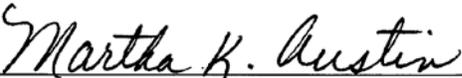
The Board concludes as a matter of law that Brennan was not qualified for the position of

Correctional Security Superintendent at JTVCC. Because Brennan was not qualified for the promotion, the issue of Michael Little's standing to grieve is moot.

ORDER

It is this **3rd** day of **October, 2012**, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the DOC's motion to dismiss and to grant the employee/grievants' appeals.

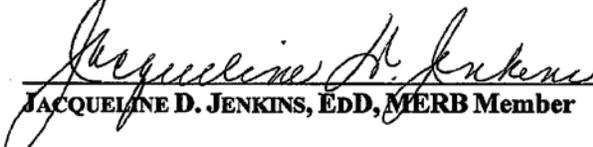
The Board orders the DOC to re-post the position of Correctional Security Superintendent for the James T. Vaughn Correctional Center within thirty (30) days of the date of this Order. Brennan may remain as "Acting" CSS. If the job posting provides for equivalent work experience, and Brennan re-applies for the position, then the DOC cannot take into account his experience as CSS in evaluating him as a candidate for the promotion because he was not qualified for the position in the first place. The DOC can only consider whether his work experience as a Trainer/Educator III at the time he first applied for the promotion was equivalent to one of the positions listed in the job qualifications.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **October 3,** 2012

Distribution:

Original: File

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Agency's Representative
Board Counsel
HRM/OMB

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